Supreme Court
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

BETTY BROWN AND ROGER BROWN,
Petitioners

vs.

UNIROYAL, INC. and UNIROYAL GOODRICH TIRE COMPANY, Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is whether the Tenth Circuit improperly applied the standard for relief from judgment under Fed. R. Civ. P. 60(b) brought in an independent action to set aside judgment for fraud on the court. The Tenth Circuit's legal standard is directly at odds with those from other courts, including the U.S. Third and Ninth Circuit Courts of Appeal.

The Tenth Circuit's standard holds, *inter alia*, that misleading discovery responses and even perjury does not constitute fraud upon the court sufficient to sustain an independent action for relief from judgment under Rule 60(b). The legal standard from other Circuits differs markedly and is less stringent to the movant.

INTERESTED PARTIES AND RULE 29.6 LISTING

1. Betty Brown and Roger Brown, petitioners.

2. Uniroyal, Inc., respondent and defendant/appellee below.

3. Uniroyal Goodrich Tire Co., respondent and defendant/appellee below.

4. Uniroyal Goodrich Canada, Inc., defendant below.

5. Uniroyal Chemical Ltd., defendant below.

6. Uniroyal LTEE, defendant below.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at Brown v. Uniroyal, Inc., 108 F.3d 1306 (10th Cir. 1997) and is also reproduced in the appendix to this petition.

JURISDICTION

The Court of Appeals entered its judgment below on March 17, 1997 and denied rehearing on May 1, 1997.

In July, 1997 the Honorable Stephen G. Breyer, Associate Justice, granted petitioners' Motion for an Extension of Time to and including August 29, 1997 in which to file this petition. This Court possesses jurisdiction under 28 U.S.C. section 1254(1).

STATUTORY PROVISION INVOLVED

This petition involves Rule 60(b), of the Federal Rules of Civil Procedure. That provision states:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On Motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have

been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), and (3), not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant, not actually personally notified as provided in Title 28, U.S.C.

section 1655 or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram nobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

The U.S. Tenth Circuit Court of Appeals possessed jurisdiction on this case pursuant to 28 U.S.C. 1291, and the District Court's jurisdiction was based upon 28 U.S.C. 1332.

Petitioners are wife and husband. Petitioner Betty Brown was employed at a Uniroyal tire plant in Ardmore, Oklahoma. In May, 1986 her right arm was twisted off below the elbow by a tire machine, in a work-related accident. App. at [A 2]

Petitioners filed a negligence and products liability action in the United States District Court for the Eastern

District of Oklahoma in 1988, against two Canadian companies, Uniroyal Goodrich Canada, Inc., and Uniroyal Ltee. At the time the Brown s believed that these two corporations had designed and manufactured the machine. Id.

In March, 1989 the Browns sought, under Fed. R. Civ. P. 15 to amend the complaint to allege as defendant Respondent Uniroyal, Inc. Discovery in the suit had revealed that Uniroyal Inc., was not the employer of Brown, and thus not entitled to workers' compensation tort immunity at the time of the accident, due to corporate restructuring. Also, discovery had shown that Uniroyal, Inc., had a role in the machine's design. App. at A 3.

The motion to add Uniroyal, Inc. was filed within one week of the deposition that revealed Uniroyal, Inc. was not Betty Brown's employer. The Motion to add Uniroyal, Inc. did come after the Oklahoma two year statute of limitations had expired. The Browns contended that the

statute of limitations was not a bar because of the "relation back" provision of Fed. R. Civ. P. 15(c).[1] App. at A 3-A

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[1]Fed. R. Civ. P. 15(c) states:

An amendment of a pleading relates back to the date of the original pleading when (1) relation back is permitted by law that provides the statute of limitations applicable to the action, or (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or (3) the amendment charges the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party is to be brought in by amendment (A) has received such notice

4; C 3.

The district court took extensive briefing on the Motion to add the new party. Counsel for defendants objected vigorously, arguing, *inter alia*, that Uniroyal, Inc., did not have notice of the suit. Uniroyal, Inc., denied that it had been served with process at the outset of the suit.

The district court found that the Canadian defendant Uniroyal, Ltee. was a subsidiary, albeit not wholly-owned, of Uniroyal, Inc. App. at A 5. The district court concluded that Uniroyal, Inc., had not "received such notice that it [would] not be prejudiced in maintaining its defense, " and

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of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

denied the Rule 15(c) Motion to add Uniroyal, Inc., App. at A 5.

In August, 1989 the district court then entered summary judgment against Petitioners, in favor of the two Canadian defendants. Id. The appellate court affirmed in 1991. Id.

After the Tenth Circuit's ruling in 1991, various proceedings were had in state court. App. at A 8 n. 3. These caused Petitioners to file a new suit in the district court in 1994. That complaint, against the Uniroyal Canadian defendants as well as Respondents Uniroyal, Inc., and Uniroyal Goodrich Tire Co., sought fraud damages, as well as relief from the earlier judgment pursuant to Fed. R. Civ. 60(b).

The complaint alleged, *inter alia*, that defendant made fraudulent representations in papers filed with the district court, as well as providing misleading discovery responses, to defeat the Rule 15(c) Motion to add Uniroyal,

Inc., as a defendant in the original suit. App. at C 10. The district court granted summary judgment in favor of the Canadian defendants. It also noted that since one year had passed since the contested judgment, summary judgment on all Rule 60(b) claims should be granted except those that fell under the "savings clause of Rule 60(b). App. at C 6. That clause states:

> "This rule does not limit the power of the court to entertain an independent action to relieve a party from a judgment, order, or proceeding...or to set aside a judgment for fraud upon the court."

Specifically, Petitioners alleged that, after the adverse judgment was entered, proceedings occurred in state court. App. at A 8 n.3 There Petitioners uncovered facts which made clear that, contrary to the Rule 15(c) position used to keep Uniroyal, Inc. out of the first suit, Uniroyal, Inc. did have "real notice" of the first suit, and was part of that litigation sufficient to permit its joinder

under Rule 15(c).

The facts alleged by petitioners to show fraud on the court concerning the Rule 15(c) issue included items such as:

1) In the original action the Uniroyal defendants alleged that service of the suit on Uniroyal, Inc., was "an out and out fabrication" (supplemental brief at 9) and "there was absolutely no showing that Uniroyal, Inc., received notice of the pending litigation prior to the running of the statute of limitations." However, in 1993, extensive documentation and letters among counsel and the various Uniroyal defendant were produced in the related state-court action, showing extensive correspondence that put Uniroyal, Inc. on notice.

2) Uniroyal, Inc. claimed no notice. Yet in the instant case, Petitioners requested the Oklahoma log of Prentice-Hall Corp., Uniroyal, Inc.'s agent for service of process. Uniroyal, Inc.'s initial response was "not

available." The log was later produced in discovery and showed service of the complaint upon Uniroyal, Inc., on behalf of the Canadian defendants. Aplt. App. Vol. I at 132-134; Vol. II at 270-271. As it became evident in the instant case, Prentice-Hall sent the complaint to Uniroyal, Inc.'s Assistant General Counsel five months before the statute of limitations expired. Aplt. App. Vol I at 132-134. However, while opposing the Rule 15(c) joinder, Uniroyal, Inc., claimed no notice of the suit. Aplt. App. Vol. II at 231-242.

The district court, after a change in judicial personnel, and after reviewing Uniroyal's attorney billing information which was relevant to the notice issue, granted final summary judgment against petitioners on all claims.[2]

In its holding of law on the Rule 60(b) issues, the district court stated that:

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[2]Some of the claims, not relevant here, were disposed of earlier, by another District Judge. App. at C 1-13.

"Fraud upon the court is fraud which is directed to the judicial machinery itself and is not fraud between the parties [or their attorneys] or fraudulent documents, false statements, or perjury. Allegations of nondisclosure will not support an action for fraud on the court." App. at B 4.

The Tenth Circuit affirmed, employing a legal standard for Rule 60(b) issues identical to the district court. That Court also held that "fraud upon the court" for purposes of Rule 60(b), did not involve "fraud between the parties or fraudulent documents, false statements, or perjury." In so ruling, the Court of Appeals adopted earlier holdings, Bulloch v. United States, 763 F.2d 1115 (10th Cir. 1985), and Robinson v. Audi Aktiengesellschaft, 56 F.3d 1259 (10th Cir. 1995). The Court of Appeals went on to hold that nondisclosure in pretrial discovery did not support an action for "fraud on the court," and it was only where a court member was corrupted or influenced, or

where a judge has not performed his judicial function, where relief would lie.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition because the legal standard applied by the Tenth Circuit is unjust, is permissive of perjury and fraud in civil litigation, and conflicts squarely with that employed by other Circuits, including the Third and Ninth Circuit Courts of Appeal.

I. THE TENTH CIRCUIT'S STANDARD IS IMPROVIDENT

The Tenth Circuit has unequivocally held that false or fraudulent statements in litigation, whether by a party or the party's attorney, will not state grounds for relief for "fraud upon the court" in an original action brought under the savings clause of Rule 60(b). The Tenth Circuit has taken the remarkable position that only judicial corruption is sufficient to present grounds for relief. This holding is unjust and improvident for several reasons.

First, the holding is at odds with the intent of the Federal Rules of Civil Procedure. Those rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1.

The Rules do not countenance or reward fraudulent statements or nondisclosures in litigation, especially if used to obtain a judgment or to avoid federal jurisdiction initially and deny a suitor even a chance to prevail. The Rules should be construed to reduce fraud, not suffer it. In explaining the "new federal rules" in 1947, this Court stated "The new rules ... invest the deposition-discovery process with a vital role in preparation for trial....[C]ivil trials in federal courts no longer need be carried on in the dark. The way is now clear ... for the parties to obtain the fullest possible knowledge of the issues and facts before trial." Hickman v. Taylor, 329 U.S. 495, 500 - 501, 67 S. Ct. 386, 388 - 389 (1947).

Of all the rules, the text of Rule 60(b) operates most as

a "safety" or corrective measure to right wrongs that were caused by litigants' fraudulent conduct. The Tenth Circuit, however, reads this intent out of the Rule, even for the most flagrant, craven falsehoods. The Tenth Circuit limits the Rule to instances where the judicial officer has been corrupted or corruptly influenced. But the advisory notes show this is not the intent of Rule 60(b)'s savings clause, stating instead that "[T]he rule does not limit the power of the court, when fraud has been perpetrated upon it, to give relief under the saving clause."

The Tenth Circuit's interpretation also limits the ameliorative impact that the Rule has on civil litigation. It provides no remedy after one year to a party who discovers a fraudulent judgment obtained against him.

Fraud is the serpent in the garden of federal civil litigation. No honest and fair system of voluntary discovery and fact gathering can exist when fraud is present, and when its victims have no remedy upon

discovering it. As Justice Frankfurter stated in Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575, 560, 66 S. Ct. 1176, 1179 (1946):

"The inherent power of a federal court to investigate whether a judgment was obtained by fraud is beyond question....The power to unearth such a fraud is the power to unearth it effectively."

Universal Oil, supra, and Hazel - Atlas Glass Co. v. Hartford Empire Co., 322 U. S. 238, 65 S. Ct. 997 (1944) constitute this Court's last serious discussion of the case. In more recent times, this Court has issued a strong denunciation of unscrupulous litigation tactics similar to these generally. Chambers v. NASCO, Inc. 501 U.S. 32, 111 S. Ct. 2123 (1991).

Ironically, the Tenth Circuit holding will result in more litigation and more discovery in federal civil trials. Because the opinion gives parties no Rule 60(b) savings clause remedy for false statements and misrepresentations

in discovery, parties will be less likely to reasonably and irrevocably rely upon simple interrogatory and deposition answers without verifying further. In this case, for example, Petitioners should have sued every Uniroyal entity in sight, rather than risk the ultimately-liable entity falsely claiming no notice, after the limitations period had run.

II. THE TENTH CIRCUIT'S HOLDING DIRECTLY CONFLICTS WITH OTHER CIRCUITS

The holding of the Tenth Circuit as to what constitutes "fraud on the court" sufficient to set aside a judgment in an independent action under Fed. R. Civ. P. 60 (b) is in direct conflict with the holdings in Averbach v. Rival Manufacturing Co., 809 F.2d 1016, 1021 - 1022 (3d Cir. 1987), appeal after remand, 879 F.2d 1196 (3d Cir. 1989), cert. denied. 493 U.S. 1023 (1990) and Pumphrey v. R.W. Thompson Tool Co., 62 F.3d 1128, 1131 (9th Cir. 1995). See also, Demjanjuk v. Petrovsky, 10 F.3d 338, 353 (6th

Cir. 1993)(extradition case).

Those cases in the Third, Sixth, and Ninth Circuit expressly hold, contrary to the Tenth Circuit, that Rule 60(b)'s savings clause permits relief from judgment when a material fraud has been perpetrated in discovery or at trial by an officer of the court, such as an attorney, or a party. Those cases properly hold that a discovery falsehood or fraud that goes to the heart of the case, rendering a judgment unjust, is proper grounds for relief from that illegitimate judgment under Rule 60(b). In the Sixth Circuit, even reckless disregard for the truth is sufficient for relief under Demjanjuk.

For example, in Averbach, supra, a plaintiff claimed that Rival's can opener caused a fire that burned down her house. In answer to an interrogatory, Rival admitted of one prior case where its can opener was alleged to have caused a fire. Rival won the ensuing jury trial. However, plaintiff discovered over one year later that Rival had

answered the discovery request falsely: actually at least 26 can opener fires had been reported. 809 F.2d at 1018. The interrogatory answer was grossly and deliberately false. Third Circuit righteously permitted the case to be reopened under the savings clause of Rule 60(b). Id. Accord, Pumphrey, supra (false videotape of forensic test later uncovered - judgment vacated).

In the Tenth Circuit, such fraudulent discovery answers and pleadings, even if case dispositive, leave parties like Petitioners with no remedy under Rule 60(b) for fraud on the court. Those suitors in the Tenth Circuit as simply left to suffer the lie and the injury.

This Court should unify the divergent ways in which Rule 60(b) has been applied by the Circuits. The majority view is consistent with justice and the text of the Rule. The majority view provides less comfort to the unscrupulous, and more enforcement to the truth.

CONCLUSION

Wherefore, this Court should grant the petition for writ of certiorari to the United States Court of Appeal for the Tenth Circuit.

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APPENDIX TO PETITION

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

BETTY BROWN and ROGER BROWN,
her husband.

Plaintiffs-Appellants,

v.

No.: 96-7007
Filed March 17, 1997

UNIROYAL, INC., UNIROYAL GOODRICH TIRE CO.,

Defendants-Appellees,
and

UNIROYAL GOODRICH CANADA, INC., UNIROYAL CHEMICAL LTD./ UNIROYAL LTEE.

Defendants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA
(D.C. No. CV-94-185)

Bruce W. Pitzer, Sarasota, Florida, for the Plaintiffs-Appellants.

George D. Davis, McKinney, Stringer & Webster, P.C., Oklahoma, for the Defendants-Appellees.

Before TACHA, Circuit Judge, BALDOCK, Circuit Judge, and MCWILLIAMS, Senior Circuit Judge.

MCWILLIAMS, Senior Circuit Judge.

Betty Brown was employed by Uniroyal, Inc., at its tire plant in Ardmore, Oklahoma, sometime prior to 1984. On October 27, 1985, Uniroyal, Inc., transferred its interest in the plant and equipment to a separate corporation, Uniroyal Goodrich Tire Co., Inc. On May 22, 1986, Betty Brown was injured on the job by a tire-making machine at the plant, her right arm having been caught in the machine and twisted off below the elbow.

On January 14, 1988, Betty Brown and her husband, Roger Brown, filed a negligence and products liability action in the United States District Court for the Eastern District of Oklahoma, naming as defendants two Canadian corporations, Uniroyal Goodrich Canada, Inc., and Uniroyal Chemical Ltd./Uniroyal Ltee. At the time, the Browns apparently believed that the two Canadian corporations had designed and

manufactured the machine which injured Betty Brown.[1] Jurisdiction was based on diversity of citizenship. 28 U.S.C. § 1332 (a)(2).

On March 1, 1989, the Browns, based upon information apparently gained from the deposition of one David O'Boyle, Assistant General Counsel for Uniroyal Holdings, Inc., taken on February 21, 1989, filed a motion under Fed. R. Civ. P. 15 to add Unroyal, Inc., as a party defendant. In that motion, the Browns alleged that discovery had revealed that the subject machine which injured Betty Brown was "in all probability" designed by James D. Schnarr, an employee of Uniroyal, Inc., in Opelika, Alabama. Designated as the defendants in that motion were Uniroyal Goodrich Canada, Inc., and Uniroyal Chemical Ltd./Uniroyal Ltee., a subsidiary of Uniroyal Tire, Inc. The Browns' motion to add Uniroyal, Inc., as a party defendant was

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[1]In their brief, the Browns state that their decision to bring suit against the two Canadian corporations was based upon information which Roger Brown, Betty Brown's husband, who was a plant maintenance emplyee at Uniroyal Goodrich Tire Co., took from the mintenance computer of the machine which injured Betty Brown.

opposed by the two Canadian corporations on the grounds that to add Uniroyal, Inc., as a defendant at such a late date would constitute "needless delay" to disposition of the Browns' action against them. The two Canadian defendants also alleged that any claim of the Browns against Uniroyal, Inc., was time-barred by Oklahoma's two year statute of limitations. 12 O.S. § 95(3), since the "relation back" doctrine in Fed. R. Civ. P. 15(c) was not applicable to the case.[2]

On May 2, 1989, the district court denied the Browns' motion to add Uniroyal, Inc., as a defendant. In so doing, the district court noted that the motion to add Uniroyal, Inc., as a defendant was filed more than two years after Betty Brown's accident and that accordingly, but for an application of the

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[2]The record before us does not indicate that Uniroyal, Inc., which was not identified as a defendant in the motion to add Uniroyal, Inc., as a defendant, made any appearance of any sort in connection with the Browns' motion to add it as a defendant. Rather, it was the two Canadian corporations which opposed the Browns' motion to add Uniroyal, Inc., as a defendant. All parties in the present proceeding have, at times, referred to the four corporate entities as being one.

"relation back" doctrine, any claim by the Browns against Uniroyal, Inc., would be time-barred by Oklahoma's two year statute of limitations. 12 O.S. § 95(3). However, the district court recognized that under Fed. R. Civ. P. 15(c) if a claim asserted in an amended pleading arose out of the conduct, transaction, or occurrence set forth in the original pleading, the amendment may relate back to the date of the original pleading, which would bring Uniroyal, Inc., within the two year statute of limitations.

The district court then went on to further note that Rule 15(c) also provides that where an amendment would add a party, as here, "relation back" would only occur if, *inter alia*, the party to be brought in by amendment "has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits." In this connection, the district court quoted from *Schiavone v. Fortune*, 477 U.S.21, 29 (1986), where the Supreme Court spoke as follows:

> Relation back is dependent upon four factors, all of which must be satisfied: (1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have

> received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; (4) the second and third requirements must have been fulfilled within the prescribed limitations period.

In denying the motion to add Uniroyal, Inc., as a defendant, the district court observed that Uniroyal Chemical Ltd./Uniroyal Ltee., had admitted in its pleadings that it "is a subsidiary of Uniroyal, Inc.," though there had been no showing that it was a "wholly owned subsidiary," (emphasis in original). The district court also noted that the Browns asserted that Uniroyal Chemical Ltd./Uniroyal Ltee., and Uniroyal, Inc., had the same agent for service of process, which the defendants apparently denied. The district court then concluded that the Browns had failed to demonstrate that they had met the second criteria set out in *Schiavone*, i.e., that Uniroyal, Inc., had "received such notice that it will not be prejudiced in maintaining its defense." It was on this basis that the district court denied the Browns' motion to add Uniroyal, Inc., as a defendant.

On August 14, 1989, the district court entered summary

judgment for the two Canadian corporations and the Browns appealed this order as well as the order denying their motion to add Uniroyal, Inc., as a party defendant.

On appeal, this court in an unpublished order and judgment affirmed the judgment of the district court in its entirety, *Brown, et at. v. Uniroyal Goodrich Canada, Inc.*, No.: 89-7087 (10th Cir. Jan. 28, 1991) (hereinafter Brown I). In so doing, we concurred "in the district court's determinations...for substantially the reasons set forth in the district court's orders entered on May 2, 1989, and August 14, 1989," A petition for rehearing en banc in Brown I was denied on March 1, 1991.

Some three years later, on March 28, 1994, the Browns filed an action in the United States District Court for the Eastern District of Oklahoma against Uniroyal, Inc., Uniroyal Goodrich Tire Co., and the two Canadian corporations. A copy of that complaint is not in the record before us, though the defendants' answer thereto is in the record. That action apparently was based on Fed. R. Civ. P. 60(b), i.e., an action seeking relief from the judgment entered in Brown I based on fraud on the

court (hereinafter Brown II). In their brief, the Browns assert that in resisting their motion to add Uniroyal, Inc., as a party defendant, Uniroyal, Inc., committed a fraud on the court and deceived the court by claiming that it did not have "notice" of their suit against the two Canadian corporations and, therefore, would be prejudiced if forced into an early trial since it had not taken part in discovery or investigation.[3]

Brown II was assigned to the Honorable Frank Seay, a United States District Judge for the Eastern District of Oklahoma. On May 15, 1994, the defendants filed a motion to reassign the case to the Honorable H. Dale Cook, Judge Cook having been the presiding judge in Brown I. On June 15, 1994, the case was reassigned to Judge Cook.

After discovery, the defendants moved for summary judgement, and on January 25, 1995, Judge Cook granted partial summary judgement in favor of all defendants. Specifically,

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[3]In their brief, the Browns stated they first found out that Uniroyal, Inc., had committed a fraud on the court in Brown I in subsequent related proceedings in the Oklahoma state courts.

Judge Cook entered judgment as follows:

> 1. granted the motion of Uniroyal Goodrich Canada, Inc., and Uniroyal Chemical, Ltd./Uniroyal Ltee., for summary judgment "as to all claims of the plaintiffs."
>
> 2. granted the motion of Uniroyal, Inc., and Uniroyal Goodrich Tire Co., "as to all claims except any claims to reopen the case assigned Docket Number 88-020-C [Brown I] in this court on account of the allegedly false statements made by defendants regarding notice to Uniroyal, Inc., and whether Uniroyal, Inc., had an adequate opportunity to participate in discovery that were made in papers filed in opposition to the plaintiffs' motion to amend their complaint to add Uniroyal, Inc., as a party in Docket No. 88-020-C."

In his order of the same date, which explains his judgment, Judge Cook noted that in their complaint the Browns alleged that "Uniroyal, Inc., through its attorneys, fraudulently represented to this court:

> (1) Uniroyal, Inc., would be prejudiced by being subjected to trial in a matter of weeks without ever having had a direct interest in the investigatory and discovery process.
>
> (2) Neither of the named defendants were wholly owned subsidiaries of Uniroyal, Inc.
>
> (3) Uniroyal, Inc., had never received "real notice" of the commencement of the action.
>
> (4) The plaintiffs had admitted David O'Boyle was not a Uniroyal, Inc., employee.

(5) That plaintiffs made a voluntary and conscious decision to do nothing to add Uniroyal, Inc., when they learned of the link between Uniroyal, Inc., and the design of the machine.

(6) Uniroyal, Inc., had not had any legal interest in the outcome of the litigation."

Judge Cook granted summary judgment in favor of the defendants as to the Browns' contentions contained in paragraphs 2, 4, 5 and 6. Judge Cook declined to grant summary judgment on the contentions made in paragraphs 1 and 3 because there was a pending motion of the Browns for discovery which conceivably could affect the resolution thereof.

On January 25, 1995, Judge Cook also ordered that Uniroyal Goodrich Tire Co., provide the Browns with certain documents requested by them, and at the same time ordered that other documents requested by the Browns be given to the court for *in camera* review to determine whether such were so confidential as to preclude disclosure to the Browns. On June 12, 1995, Judge Cook ordered that the documents which had been turned over to him by Uniroyal Goodrich Tire Co., for *in camera* review should be "produced to the plaintiffs in their

entirety." In his order of January 25, 1995, Judge Cook had stated that the defendants could renew their motion for summary judgement "as to any unresolved claims within twenty days of the date on which plaintiffs are provided with their requested documents." Within that time limit, the defendants filed a renewed motion for summary judgment, to which the Browns filed a response.

In their brief in support of the renewed motion for summary judgment, the defendants asserted that the "bills and letters" given to the Browns by the defendants under order of court did not constitute any evidence of fraud on the court by any defendant and that "Uniroyal, Inc.'s 'knowledge' and 'investigation' of the Betty Brown accident was in the context of possible employer liability only." As indicated, Uniroyal, Inc., transferred its interest in the plant at Ardmore, Oklahoma, to Uniroyal Goodrich Tire Co., a separate and distinct corporation, a few months before the accident, and Uniroyal, Inc., was concerned about the "dual capacity" doctrine which might possiby make Uniroyal, Inc., liable to Betty Brown for worker's

compensation benefits.

In their response to defendants' renewed motion for summary judgment, and in their supporting brief, the Browns complained about the "confusion" caused by the similarity in the corporate names of the four defendants and concluded by stating that "[a]ll of the assertions in question were made directly to the court with the purpose of influencing this court [and] [t]he summary judgment should be denied."

The defendants filed a reply to the Browns' response in which they claimed, *inter alia*, that the Browns were arguing matters that were outside the scope of the issues to be resolved by Judge Seay, as set forth in Judge Cook's order of January 25, 1995.

On October 13, 1995, Brown II was reassigned back to Judge Seay, who, on December 19, 1995, granted the defendants' renewed motion for summary judgment on the claims not disposed of by Judge Cook in his order of Janurary 25, 1995. In so doing, Judge Seay held, in esence, that there was an insufficient showing that Uniroyal, Inc., had committed

any fraud on the court in connection with the Browns' attempt to add Uniroyal, Inc., as a party defendant in Brown I a few weeks before trial. Specifically, Judge Seay concluded that there was an insufficient showing that prior to the motion to add it as a defendant in Brown I, Uniroyal, Inc., had notice that it had any sort of liability to the Browns, except possible liability under local Oklahoma worker's compensation law, nor had it participated, as such, in discovery in Brown I. In the same general connection, Judge Seay held that there was no showing by the Browns that in resisting their motion to add Uniroyal, Inc. as a defendant there was any intent on the part of Uniroyal, Inc., to deceive or defraud the court.

The Browns have appealed Judge Seay's order and judgment of December 19, 1995. The Browns have not appealed Judge Cook's order and judgement of January 25, 1995, which, *inter alia*, dismissed all claims against the two Canadian corporations, Uniroyal Goodrich Canada, Inc., and

Uniroyal Chemical Ltd./Uniroyal Ltee.[4] We affirm.

We regard the issue to be decided in this appeal to be a very narrow one. As indicated, the Browns have not appealed any part of the order and judgment entered by Judge Cook on January 25, 1995. By that order and judgment only one matter remained to be resolved, namely, whether Uniroyal, Inc., through its attorneys, fraudulently represented to the court that "Uniroyal, Inc., would be prejudiced by being subjected to trial in a matter of weeks without ever having had a direct interest in the investigatory and discovery process" and that "Uniroyal, Inc., had never received 'real notice' of the commencement of the action," thereby committing fraud on the court. In this regard, Judge Seay in his order and judgment of December 19, 1995, after considering, *inter alia*, the documents produced in connection with the Browns' motion to produce, concluded that there was an insufficient showing by the Browns of any intent by Uniroyal, Inc., or any other entity for that matter, to deceive

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[4]Neither of the two Canadian corporations is an appellee in the present proceeding.

or defraud the court in Brown I. We agree.

Under Fed. R. Civ. P. 60(b), a motion to set aside a final judgment on the ground of fraud, misrepresentation or other misconduct of an adverse party must be filed within one year after the judgment was entered. Brown II was not filed within one year after Brown I. However, that same rule goes on to provide as follows:

> This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or preceding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud on the Court.[5]

It would appear that the Browns' present action is brought pursuant to the above quoted portion of Fed. R. Civ. P. 60(b).

The parties apparently agree that if the case were to go to trial, the Browns, in order to prevail, would have to prove fraud by clear and convincing evidence. In *Applied Genetice*

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[5]28 U.S.C. § 1655 concerns "absent defendants" in a "lien enforecement" proceeding where the defendant has not been "personally notified," and, accordingly, it would appear to have no applicability to the present case.

Int'l., Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238 (10th Cir. 1990), we held that the "clear and convincing" standard should be considered in determining whether a defenant's motion for summary judgment should be granted on a plaintiff's claim of fraud. In so holding, we stated as follows:

> The Supreme Court has held that "the inquiry involved in a ruling on a motion for summary judgment or for a direct verdict necassarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits." The Court in *Liberty Lobby* specifically held that the clear and convincing standard of proof required in that libel action "should be taken into account in ruling on summary judgment motions." Therefore, because Wyoming law requires clear and convincing proof of fraud, we will review the grant of summary judgment on the issue of fraud in light of that standard. ("Against the backdrop of a motion for summary judgment, fraud must be demonstrated in a clear and convincing manner.")

Applied Genetices, 912 F.2d at 1243 (citations omitted).

In *Bulloch v. United States*, 763 F.2d 1115 (10th Cir. 1985), we reversed a district court's order which set aside a judgment previously entered in favor of the United States on the ground that the United States had perpetuated a fraud on the court. In so doing, we spoke as follows:

> This case demonstrates the very good reasons

> why judgments should be final and should not be disturbed. The plaintiffs to prevail must have shown by clear and convincing evidence that there was fraud on the court, and all doubts must be resolved in favor of the finality of the judgment.
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> * * * * *
>
> Fraud on the court (other than fraud as to jurisdiction) is fraud which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury. It has been held that allegations of nondiscloure in pretrial discovery will not support an action for fraud on the court. It is thus fraud where the court or a member is corrupted or influenced or influence is attempted or where the judge has not performed his judicial function--thus where the impartial functions of the court have been directly corrupted.

Bulloch, 763 F.2d at 1121(citations omitted).

To like effect, *see Robinson v. Audi Aktiengesellschaft*, 56 F.3d 1259 (10th Cir. 1995). In *Robinson*, we affirmed a district court's judgment denying a motion by the plaintiffs, who as motorists had brought a products liability action against the manufactureer of their vehicle, to set aside a judgment for the manufacturer on the ground that the manufacturer and its counsel had committed fraud on the court. In so doing, we spoke as follows:

> Any request to set a judgment must be viewed in light of a fundamental principle of the finality of duly entered judgments: namely, where a reasonable opportunity has been affored to the parties to litgate a claim before a court having jurisdiction, and the court has finally decided the controversy, the interests of the public and of the parties require that the validity of the claim and any issue actually litigated in the action shall not be litigated again by them. One long-recognized exception to the general rule of finality is where a judgment was based on a claim that the party obtaining the judgment kew it to be fraudulent. Historically, this exception was said to apply, however, only when the fraud was so successful that the other party was not even aware that he had a possibility of a claim or defense. By contrast relief was not available--even in the case of an erroneous and inequitable judgment--on the sole ground that the judgment was obtained by perjured testimony or that the complainant failed to maintain his action because of a non-fraudulent misrepresentation as to the facts by the other party.

Robinson, 56 F.3d at 1265-66 (citations omitted).

Under the rationale of such cases as *Robinson* and *Bulloch*, we conclude that Judge Seay did not err in concluding that, on the basis of the record before him, the Browns did not demonstrate that Uniroyal, Inc., or Uniroyal Goodrich Tire Co., had committed a fraud on the court.[6] As far as we can tell from

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[6]We reject any suggestion that the judgement entered by Judge Seay on December 19, 1995, is somehow at odds with Judge Cook's judgment of January 25, 1995.

the record before us, neither Uniroyal, Inc., or Uniroyal Goodrich Tire Co., the only appellees in the present proceeding, made any representation, as such, to the court in Brown I.

Judgment affirmed.

IN THE UNITED STATES DISTRICT COURT FOR

THE EASTERN DISTRICT OF OKLAHOMA

BETTY BROWN and ROGER BROWN,

Plaintiffs,

v. No.: CIV-94-185-S

UNIROYAL, INC., et al.,

Filed December 19, 1995

Defendants.

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ORDER

Granting Defendant's Renewed Motion for Summary Judgment

Judge Cook has previouly granted herein the motions of the defendants Uniroyal, Inc., and Uniroyal Goodrich Tire Co., for summary judgment as to all claims in this case, except any claims to reopen Case No. 88-020-C, in the Eastern District of Oklahoma,[1] based upon allegedly false statements made by the defendant, regarding notice to Uniroyal, Inc., and lack of

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[1]Judge Cook referred to this earlier case as *Brown I* and this present case as *Brown II*.

adequate opportunity to participate in discovery, in papers filed in opposition to plaintiffs' motion to amend their complaint to add Uniroyal, Inc., as a party in Case No. 88-020-C, in the Eastern District of Oklahoma. Judge Cook permitted the defendants to file a renewed motion for summary judgment as to those issues after supplying plaintiffs with billing and statements and supporting documents on a then pending discovery motion concerning those issues. (This court's order granting summary judgment as to the Canadian Uniroyal defendants and partial summary judgment as to these Uniroyal defendants, filed January 25, 1995, pp. 13-15). After providing that discovery material, these defendnats renewed their motion for summary judgment on those issues.

The court finds that there are no genuine issues of material fact necessary for the determination of these issues, such that summary judgment would be appropriate. Accordingly, pursuant to Rule 56, Federal Rules of Civil Procedure, the court makes the following Findings of Fact and Conclusions of Law:

Findings of Fact:

1. The court adopts its previous findings of fact and conclusions of law as set out in this court's order filed herein on January 25, 1995.

2. The court adopts its order and judgment filed herein January 25, 1995.

3. As previously found by this court, this case is an independent action to relieve the plaintiffs from an order denying plaintiffs' motion to amend their complaint to add the defendant Uniroyal, Inc., and the judgment in Case No. 88-020-C, in the Eastern District of Oklahoma, pursuant to the saving clause of Rule 60(b), Federal Rules of Civil Procedure, for fraud upon the court. (Plaintiffs' Complaint, p.1).

4. The previously unresolved claims of fraud upon the court, reargued by plaintiffs in their opposition to these defendants' renewed motion for summary judgment are that Uniroyal, Inc., through its attorneys, fraudulently represented to this court that (i) Uniroyal, Inc., would be

prejudiced by being subjected to trial in a matter of weeks without ever having had a direct interest in the investigatory and discovery process, and (ii) Uniroyal, Inc., had never received "real notice" of the commencement of the action. (Order filed January 25, 1995, p. 11; defendants' Renewed Motion for Summary Judgment).

5. The court finds there is nothing in the information submitted by the plaintiffs to show that the defendant Uniroyal, Inc., had any "real notice" of any liability in plaintiffs' product liability lawsuit (88-020-C or *Brown I*) against the Canadian Uniroyal defendants or participated as a party in the discovery in that case.[2] As previously determined, it did not; the liability of Uniroyal, Inc., was limited to is workers' compensation

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[2]Defendant Uniroyal, Inc., was a party defendant in a separate discovery lawsuit, Case No. 88-117-C, Eastern District of Oklahoma, concerning the product which was the subject of plaintiffs' product liability lawsuit against the Canadian Uniroyal defendants in 88-020-C or *Brown I*.

exposure. The facts that Uniroyal, Inc., and/or Uniroyal Goodrich Tire Co., may have participated in a separate discovery lawsuit (Case No. 88-117-C, Eastern District of Oklahoma) and/or provided legal assistance to the Canadian Uniroyal defendants in the products liability lawsuit (88-020-C or *Brown I*) did not and does not provide notice of liability to them, or participation in discovery by them, in that lawsuit. These facts were previously known by the court.

6. The court has examined all the attorney billings and documents discovered to the plaintiffs by the defendants and submitted to the court on this renewed motion. The court finds that the information and documentation submitted with this renewed motion fails to show any statement, representation, or concealment by these defendants which did, or would have improperly affected the impartial decisions of this court in its orders or judgment in this case. The court finds that the information submitted does not show any intent by the

defendants to deceive or defraud this court, and it doesn't indicate any act on the part of these defendants which could be characterized as a deliberate scheme to defraud. The court finds no fraud upon this court in its decision in this case.

Conclusions of Law:

1. This court has jurisdiction and venue in this case. Rule 60(b), Federal Rules of Civil Procedure and 28 U.S.C. § 1391.

2. Summary judgment shall be granted where the pleadings, depositions, answers to interrogatories, admissions, and/or affidavits show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure; Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Burnette v. Dow Chemical Co., 849 F.2d 1269, 1273 (10th Cir. 1988).

3. The mere existence of some factual dispute will not defeat a summary judgment motion. The factual dispute

must be genuine and material to the issue or issues presented. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).

4. After a movant makes a properly supported motion for summary judgment, the non-moving party has the burden of setting forth specific facts showing the existence of a genuine issue of fact for trial. An affidavit containing only conclusions of law, unsupported by factual allegations, is insufficient to establish the existence of a triable issue. Bright v. Moss Ambulance Service, Inc., 824 F.2d 819, 824 (10th Cir. 1987). Likewise, conclusary allegations are not sufficient to establish factual issues. Setliff v. Memorial Hospital of Sheridan County, 850 F.2d 1384, 1392 (10th Cir. 1988).

5. Summary Judgment is appropriate when a court can conclude that no reasonable juror could find for the non-moving party on the basis of the evidence presented in the motion and response. Anderson v. Liberty Lobby,

Inc., supra at 250-252; Windon Third Oil and Gas v. FDIC, 805 F.2d 342, 346 (10th Cir. 1986).

6. The savings clause of Rule 60(b), Federal Rules of Civil Procedure, provides in pertinent part:

> "This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, ...or to set aside a judgment for fraud upon the court."

7. Fraud upon the court is fraud which is directed to the judicial machinery itself and is not fraud between the parties [or their attorneys] or fraudulent documents, false statements or prejury. Allegations of nondisclosure will not support an action for fraud on the court. Thus, it is fraud upon the court where the impartial functions of the court have been directly corrupted. Fraud upon the court must be shown by clear and convincing evidence, and all doubts must be resolved in favor of the finality of the judgment. Bulloch v. United States, 763 F.2d 1115, 1121 (10th Cir. 1985).

8. A fraud upon the court, sufficient to defeat the finality of a judgment, requires a showing of an intent to

deceive or defraud the court. It is essential that there be a showing of conscious wrongdoing that can be properly characterized as a deliberate scheme to defraud. Misrepresentations to a court, standing alone, are insufficient to support a fraud on the court claim. Robinson v. Audi Aktiengesellschaft, 56 F.3d 1259, 1267 (10th Cir. 1995)

Accordingly, based upon the above Findings of Fact and Conclusions of Law, the Renewed Motion for Summary Judgment of the defendants Uniroyal, Inc., and Uniroyal Goodrich Tire Co., is granted.

IT IS SO ORDERED this ___ day of December, 1995.

Frank H. Seay

United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

BETTY BROWN and ROGER BROWN,

Plaintiffs,

v.

Case No. CIV-94-185-C

UNIROYAL, INC., UNIROYAL GOODRICH CANADA, INC., UNIROYAL CHEMICAL LTD./ UNIROYAL LTEE., and UNIROYAL GOODRICH TIRE CO.,

Filed January 25, 1994

Defendants.

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ORDER

In this independent action brought under F. RUL. CIV. P. § 60(b) (and the savings clauses within that provision), the plaintiffs allege fraud upon the court and seek an award of damages and to reopen a prior products liability action in which a final order was entered in 1989. The defendants, Uniroyal, Inc. and various related corporations, have moved for summary judgment under F. RUL. CIV. P. § 56.

I. BACKGROUND

Betty Brown, one of the plaintiffs in this case, was

injured by a tire making machine at a manufacturing plant in Ardmore, Oklahoma in May of 1986.[1] An action was brought in this court (Docket No. 88-020-C, hereinafter referred to as *Brown I*) against Uniroyal Goodrich Canada, Inc., and Uniroyal Chemical Ltd./Uniroyal Ltee., hereinafter referred to as the Canadian defendants. The plaintiffs believed that the tire making machine was manufactured by Rubber Machinery Shops (RMS), based on information obtained by Betty Brown's husband and co-plaintiff Roger Brown from a company computer. (Roger Brown also worked at the Ardmore plant.) RMS was a division of Uniroyal Goodrich Cananda, Inc. and had formerly been a division of Uniroyal Chemical, Ltd./Uniroyal Ltee.

The plaintiffs' complaint in *Brown I* alleged that Betty Brown was employed by Uniroyal, Inc. and that RMS manufactured the machine. Subsequent discovery revealed that

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[1]The parties do not agree on the date of the injury. Plaintiffs place it on May 26, 1986. Defendants place it on May 22, 1986. The difference of four days does not affect the court's analysis of any of the issues on this motion.

RMS was not the manufacturer, but rather that the manufacturer was King Manufacturing Company of Duncan, Oklahoma, with Uniroyal, Inc. having a role in the design of the machine. In his deposition of February 21, 1989, David O'Boyle, an attorney for a Uniroyal holding company, gave testimony that put plaintiffs on notice that Uniroyal, Inc. was no longer the employer of Betty Brown at the time of her injury due to corporate restructuring.[2] Within a little over a week after this deposition, plaintiffs moved to join Uniroyal, Inc. as a co-defendant. The motion to add Uniroyal, Inc. was made more than two years after the date of the injury but plaintiffs contended that the statute of limitations was not a bar to the claim because of the "relation back" provisions of F. RUL. CIV. P. § 60(b). Uniroyal, Inc. opposed this motion, its counsel saying that

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[2]The relevance of this Uniroyal, Inc's liability is that plaintiffs contended Uniroyal, Inc. was no longer immunized by the worker's compensation bar to actions against an employer. The defendants contend that Uniroyal, Inc., is still sufficiently related to Betty Brown's employer, Uniroyal Tire Company, Inc. that it is entitled to immunity as well. However, this defense is not a ground upon which the defendants have moved for summary judgment.

Uniroyal, Inc. had not received notice of the action and had been deprived of an adequate opportunity to participate in discovery.

The court denied the plaintiffs' motion to amend their complaint to add Uniroyal, Inc. as a party on May 2, 1989. By order of August 14, 1989, this court found that there was no issue of fact regarding who manufactured the machine and granted summary judgment in favor of the Canadian Defendants, simultaneously denying a motion to reconsider its decision regarding Uniroyal, Inc. Both the decision denying permission to add Uniroyal, Inc. and summary judgment were affirmed by the Tenth Circuit Court of Appeals on January 21, 1991.

II. THE PRESENT ACTION

The plaintiffs claim that *Brown I* should be reopened in the present action (hereinafter referred to as *Brown II*) on account of various alleged frauds on the part of the defendants in *Brown I*. In addition to the claims of fraud to reopen *Brown I*, the plaintiffs have made fraud damages claims. The claimed frauds are presented as a series of factual allegations in the

plaintiffs' complaint and other papers filed in *Brown II*. Many of the details of these claims are not relevant to the disposition of this motion. Those details that are relevant will be incorporated, below, into the discussion of the particular issues to which they relate.

III. FRAUD DAMAGES CLAIMS

The defendants moved for summary judgment, arguing that the fraud damages claims are barred by the Oklahoma statute of limitations and for other reasons. Because the court finds the claims to be barred by the statute of limitations we need not reach any other issues.

A. Alleged Fraud Regarding Who Was Employer

The plaintiffs claim that they failed to name Uniroyal, Inc. as a party sooner because of misrepresentations made by defendants and/or their legal counsel to the effect that Uniroyal, Inc. was Betty Brown's employer and in some cases the further representation that Uniroyal, Inc. was thereby immune from liability on account of the workers' compensation bar to tort actions. The fact that some misrepresentations were made is not

disputed, although the fraudulent nature of such statements is disputed in all cases. The plaintiffs contend that these misrepresentations were made in briefs, pleadings, papers, letters and a proposed agreement of the Uniroyal Goodrich Tire Company (hereinafter U.G.T.C.)[3] legal staff by which U.G.T.C. proposed to grant plaintiffs access to the plant to investigate the facts related to the injury.

The fraud damages claim arising out of allegations of fraud regarding Betty Brown's employment status is dismissed as untimely. Oklahoma allows only two years in which to bring an action for fraud. 12 O.S. § 95 (1988). In a June, 1991 letter to the lawyer Emmanuel Edem, the plaintiffs' lawyer, Bruce Pitzer, admitted knowledge of this kind of alleged fraud more than two years prior to the commencement of this action. In that letter Pitzer said:

> "There has been fraud practiced by Uniroyal, Inc. and their attorneys in Ardmore. . . . What is this fraud?

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[3]U.G.T.C. is a partnership with corporate members including Uniroyal Tire Company, Inc., the employer of Betty Brown at the date of the accident.

> Uniroyal, Inc. while knowing at the time of her injury they were not her employer but rather a sister company, Uniroyal Tire Co., Inc. did file an answer in federal court saying that Uniroyal, Inc. was the employer and her only claim was in workers comp."

We find these facts remarkably similar to those in *Federal Deposit Ins. Corp v. Palermo*, 815 F.2d 1329 (10th Cir. 1987). There the plaintiff, Palermo, counterclaimed for fraud based on fraudulent representations made by a bank that sold him property. In a letter to the loan officer who sold him the properties, written more than two years before the commencement of the action, Palermo said, "the properties you sold me were completely misrepresented...". Palermo knew that the oil producing property he had purchased was only yielding a fifth or less of the barrels per day he had been told by a loan officer it would produce and that other representations had not proven to be correct. The court held that although "Palermo apparently did not learn until after this action had been commenced that the outstanding indebtedness on the property had been misrepresented, this fact could only have served to confirm Palermo's belief that he had been misled; it did not

constitute 'discovery of the fraud' for purposes of the statute of limitations.[4] *Palermo,* supra at 1339.

In *Palermo* the letter asserts there were misrepresentations under circumstances leading to a reasonable inference of fraud; the case before this court is even stronger for the defendants because the plaintiffs' counsel in the letter at issue said that he had already reached the conclusion that the defendants' statements were fraudulent. If later investigation caused plaintiffs to conclude that other representations regarding Betty Brown's employment status were fraudulent then, as in *Palermo,* this could only serve to confirm the plaintiffs' belief that they had been victims of fraud.

B. Alleged Fraud Regarding Who Manufactured Machine

Plaintiffs claim that there was fraud not only in misrepresentations regarding Betty Brown's employment status, but that there was also a fraud in misrepresentations made by

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[4]The bank representative had said the bank could not accept less than a certain selling price because that was an amount of the outstanding indebtedness.

counsel and in faulty information on a maintenance computer that misled the plaintiffs regarding who manufactured the machine that injured Betty Brown. The court holds that the statute of limitations has run on these claims of fraud as well.

A fair reading of the *Palermo* case, supra, is that where more than one misrepresentation of a related nature is made and arises out of the same transaction or event and the plaintiff becomes aware of the fraudulent nature of one such statement, the statute of limitations period begins to run on the others as well, even if the plaintiff does not know the statements were false. It is then incumbent upon the plaintiff to bring an action for fraud and uncover related misrepresentations through the discovery process. In *Palmero* the plaintiff was aware of certain suspicious misrepresentations and discovered others later.

In the *Brown* case the facts in favor of the defendants on the statute of limitations are even stronger than in *Palermo*. Here the plaintiff was aware of misrepresentations regarding the manufacturer of the machine and the alleged fraud regarding Brown's employment status more than two years before the

commencement of the current action. The misrepresentations regarding the identity of the machine's manufacturer were made long before Bruce Pitzer's letter to Emmanuel Edem.

The court holds that although the plaintiffs may have recently discovered new evidence that the defendants' attorneys were on notice of who actually manufactured the machine, which evidence was not available to the plaintiffs previously, as in *Palermo*, this could only serve to confirm their beliefs.

C. Alleged Fraud Regarding Rule 15(c) Criteria

The plaintiffs allege that fraudulent misrepresentations were made in papers filed in this court to defeat plaintiffs' motion to add Uniroyal, Inc. under F. RUL. CIV. P. § 15(c). Plaintiffs allegations of fraud in connection with the Rule 15(c) motion to add Uniroyal, Inc. as a defendant, although somewhat different in time and nature from the allegedly fraudulent representations described in Pitzer's letter to Emmanuel Edem, nevertheless were related in the sense that the allegedly fraudulent statements were in the same case by the same lawyer (working for the same law firm) and are alleged to have had the

effect of preventing the plaintiffs from joining the same defendant. Further, they all occurred before Bruce Pitzer wrote his letter to Emmanuel Edem.

Plaintiffs argued that Uniroyal, Inc., was on notice in their Rule 15(c) motion, contrary to defendant's allegations; plaintiffs must have viewed at least some of the defendants' statements as inaccurate at the time. Further, plaintiffs knew of another alleged fraud in connection with this case (the alleged fraud regarding Betty Brown's employer discussed above) more than two years prior to the commencement of this action and could have brought an action and initiated discovery on these matters at that time. Under the *Palermo* case, supra, we hold that the statute of limitations has run on all of the claims for fraud damages currently pending in this case on account of the plaintiffs' knowledge of alleged fraud evidenced by the June 19, 1991 letter of plaintiffs' counsel to Emmanuel Edem. The statute of limitations expired no later than June 19, 1993 and the complaint in *Brown II* was not filed until March 28, 1994.

IV. CLAIMS TO REOPEN THE CASE

A. The Canadian Defendants

Summary judgment will be granted for the Canadian defendants regarding all claims of the plaintiffs related to reopening the case. The reason this court granted summary judgment in favor of the Canadian defendants is that they did not manufacture or design the injury-causing machine. None of the plaintiffs' allegations of fraud suggest that the court was mistaken as to this fact, nor do they suggest that any of the alleged or admitted misrepresentations affected the resolution of the case as to these two defendants. Accordingly it is the conclusion of the court that irrespective of any fraud alleged in this action the reasons for granting summary judgment in favor of the Canadian defendants still stand and there are no grounds for reopening the case against them. Fraud is not a ground for disturbing a judgment where the fraud was in no way relevant to the grounds upon which the judgment was granted. *Jungersen v. Axel Bros., Inc.*, 217 F.2d 646 (2d Cir. 1954), *aff'g* 121 F.Supp.

712 (S.D.N.Y), *cert. denied*, 348 U.S. 940 (1995)[5]

B. Uniroyal, Inc., and U.G.T.C.

1. Claims Arising Directly Under R. RUL. CIV. P. § 60(b)

Summary judgment is granted for the remaining defendants (Uniroyal, Inc. and U.G.T.C.) as to all § 60(b) claims that do not fall under the savings clauses of § 60(b)[6] because they are untimely. Under this rule there is a time limit of one year after an order or judgment was entered for any challenge

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[5]*Hazel Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238 (1944) is not to the contrary because in that case *equitable* relief was sought and *the very attempt to influence the court by fraud* defeated the *plaintiff's* claim on general equitable principles that those who seek equity must do equity regardless of the relevance of the misrepresented facts.

[6]The savings clauses of FED. R. CIV. P. § 60(b) provide as follows:

> This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655 or to set aside a judgment for fraud upon the court.

based on mistake, newly discovered evidence or fraud. The judgment in *Brown I* was entered on August 14, 1989, more that one year before the filing of the complaint in this action on March 28, 1994.

2. Claims Within F. RUL. CIV. P. § 60(b) Savings Clauses

a. Alleged Fraud Regarding Who Was Employer

Although the plaintiffs' complaint alleges "fraud upon the court" the factual allegations could fit other theories for reopening the case and the plaintiffs do cite in their motion papers the case of *Marshall v. Holmes,* 141 U.S. 589 (1891), a case of equitable relief from a judgment on grounds of fraud rather than "fraud upon the court". Such an action for equitable relief from a prior judgment is subject to equitable principles and may be defeated on grounds of laches. *Boone County v. Burlington and Missouri River Railroad Co.,* 139 U.S. 684 (1891). Although laches is largely a factual question, the plaintiff must at least present an explanation for any delays or an action may be dismissed for laches without a hearing. *Sciria*

v. United States, 238 F.2d 77 (6th Cir. 1956). The section of this order concerning the statute of limitations on the fraud damages claim, supra, explains that the plaintiffs' attorney was aware of the alleged fraud regarding Betty Brown's employment status more than two years prior to the commencement of the current action. Further, even after the disclosure of additional documents on August 9, 1993, which the plaintiffs claim support the claims of fraud, plaintiffs waited until March 28, 1994 to bring this action. There is nothing in the papers before this court to adequately explain these delays. In addition, claims of fraud, other than "fraud upon the court" are barred by the Oklahoma statute of limitations. See *Boone County*, supra and the discussion of the statute of limitations, supra.

Allegations of fraud upon the court are not subject to limitations or laches. *Bulloch v. United States*, 763 F.2d 1115, 1121 (10th Cir. 1985), *cert. denied*, 474 U.S. 1086 (1986).[7]

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[7]The Tenth Circuit also said, however, that unexplained delays in bringing such a claim may have a bearing on the concept of finality of judgments and the proof.

However, the plaintiffs' allegations of fraud on the part of the Canadian defendants' counsel during *Brown I* are only allegations of fraud between the parties. The court was well aware that Uniroyal Tire Company, Inc. was Betty Brown's true employer at the time of the prior judgment. The court was not misled and no such fraud, if there was a fraud, had any effect on the final judgment in *Brown I*. The plaintiffs allege that they were misled and missed the statue of limitations because of misrepresentations made by an attorney, an officer of the court.

In *Bulloch v. United States*, 763 F.2d 1115, 1121 (10th Cir. 1985), *cert. denied*, 474 U.S. 1086 (1986), supra, the Tenth Circuit held:

> Fraud on the court (other than fraud as to jurisdiction) is fraud which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury.... It is thus fraud where the court or a member is corrupted or influenced or influence is attempted or where the judge has not performed his judicial function-thus where the impartial functions of the court have been directly corrupted.

The court holds that attorney involvement in fraud between the parties does not constitute "fraud upon the court" unless the fraudulent misrepresentations are made *to the court* in a manner

that influences or attempts to influence the court's decisions. There is not even a factual issue that such was the case here.

b. Alleged Fraud Regarding Who Manufactured Machine

Regardless of the accuracy of the plaintiffs' allegations of fraud regarding who manufactured the machine, allegations of this sort cannot be a ground for reopening the case. It is not disputed that the machine was manufactured by the King Manufacturing Company of Duncan, Oklahoma, which is not a party to this case. None of the allegations in this case change the fact that the named defendants in *Brown II* did not manufacture the machine. Once again, the court points out that fraud is not a ground for disturbing a judgment where the fraud was in no way relevant to the grounds upon which the judgment was granted. *Jungersen v. Axel Bros., Inc.*, 217 F.2d 646 (2d Cir. 1954), aff'g 121 F.Supp. 712 (S.D.N.Y.), *cert. denied*, 348 U.S. 940 (1955), supra.

c. Alleged Fraud Regarding Rule 15(c) Criteria

The plaintiffs claim that Uniroyal, Inc., through its

attorneys, fraudulently represented to this court:

> (1) Uniroyal, Inc. would be prejudiced by being subjected to trial in a matter of weeks without ever having had a direct interest in the investigatory and discovery process.
>
> (2) Neither of the named defendants were wholly owned subsidiaries of Uniroyal, Inc.
>
> (3) Uniroyal, Inc. had never received "real notice" of the commencement of the action.
>
> (4) That plaintiffs had admitted David O'Boyle was not a Uniroyal, Inc. employee.
>
> (5) That plaintiffs made a voluntary and conscious decision to do nothing to add Uniroyal, Inc. when they learned of the link between Uniroyal, Inc. and the design of the machine.
>
> (6) Uniroyal, Inc. had not had any legal interest in the outcome of the litigation.

With regard to item (6) the plaintiffs point to a fund for contingent liabilities mentioned in the February 21, 1989 deposition of David O'Boyle. This deposition preceded both the May 2, 1989 order denying the plaintiffs' motion to add Uniroyal, Inc. and the final order and judgment of August 14, 1989. The plaintiffs had their opportunity to raise this issue because of the *res judicata* effect of the court's prior decisions.

Matters that could have been raised in a previous action cannot justify reopening decisions in that prior action. *Wilkin v. Sunbeam Corp.*, 466 F.2d 714 (10th Cir. 1972); *Brown v. McCormick*, 608 F.2d 410 (10th Cir. 1979); and *Bulloch v. United States*, 763 F.2d 1115 (10th Cir. 1985), *cert. denied*, 474 U.S. 1086 (1986).

Items (4) and (5), above, relate only to the defendants' argument and characterization of the record or their opponents' arguments. Even if the characterizations were misleading the court had before it sufficient information to make that determination at the time and the plaintiffs had their opportunity at that time to dispute mischaracterizations of their motives or position. Again, the prior judgments are *res judicata*. *Wilkin v. Sunbeam Corp.*, supra; *Brown v. McCormick*, supra; and *Bulloch v. United States*, supra.

The plaintiffs contend that item (2) above is contradicted by the fact that Gary Farabough, the attorney for the defendants in *Brown I*, was seeking to find out if this was true in a February 1989 letter. However, the alleged fraudulent statement

was made on June 21, 1989. That Farabough made a statement in June after making inquires in February does not even tend to prove anything fraudulent or improper. Plaintiffs' allegations need not be disproved when their lack of materiality or sufficiency is demonstrated. *Windon Third Oil and Gas v. Federal Deposit Ins.*, 805 F.2d 342 (10th Cir. 1986), *cert. denied*, 480 U.S. 947 (1987).

Summary judgment will not be granted with regard to allegations (1) and (3) above, because there is currently pending a discovery motion relating to billing statements and supporting documents that is directed toward discovering information that may have a bearing on notice to Uniroyal, Inc., and the extent of Uniroyal, Inc.'s participation in the discovery process.[8]

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[8]The court has considered the defendants' contentions that these matters be resolved in their favor based on the *res judicata* effect of *Brown I*. The court holds that *Brown I* is not *res judicata* as to the issue of fraud in the motion to add Uniroyal, Inc. as a party because plaintiff did not allege that the defendants' papers were fraudulent in *Brown I*. Although the plaintiffs disputed the defendants' position at that time there is nothing in the record to indicate that the plaintiffs knew of the alleged fraud regarding the Rule 15(c)

Pursuant to the court's authority under F. RUL. CIV. P. § 56(f) to "make such other order as is just" to protect the

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motion before the final judgment in *Brown I*.

The court has also considered the argument that this fraud claim is precluded by the *res judicata* (or collateral estoppel) effect of the prior state court cases. In order for *res judicata* to apply, there must be an identity of the claim presented in the earlier case. 1B MOORE, FEDERAL PRACTICE ¶ 0.410[1] (1994); see also *Snider v. Circle K Corp.*, 923 F.2d 1404 (10th Cir. 1991) on the related issue of the preclusive effect of a settlement. The court has examined the papers from those cases presented on this motion and has determined that they did not allege fraud in connection with the Rule 15(c) motion in the federal court action. The first case was a products liability case and the subsequent cases concerned alleged fraud in the first *state* court case. Neither the matter nor the legal issue of fraud in the federal Rule 15(c) motion discussed here were before the state courts in those cases. In fact, the claim of "fraud upon the court" (alleging a fraud in *this* court) could not have been brought in state court because it must be brought in the court upon which the alleged fraud was perpetrated. *Taft v. Donellan Jerome, Inc.*, 407 F.2d 807 (7th Cir. 1969); and *United Business Communications v. Racal-Milgo, Inc.*, 591 F.Supp. 1172, 1185 (D.Kansas 1984). If there were any factual issues decided that are pertinent to *Brown II* and could have collateral estoppel effect relevant to these matters, the opinions rendered by those state courts are not sufficiently specific for this court to identify any such decided issues.

plaintiffs' interest in disclosure the court will permit the defendants to renew their motion for summary judgment, together with such additional supporting papers as they deem appropriate, as to these unresolved claims within twenty days of the date on which plaintiffs are provided with their requested documents.[9]

The plaintiffs further allege that Uniroyal, Inc., through its corporate counsel, Paul Malesick gave "evasive and false" answers at an April 27, 1988 deposition. The plaintiffs here merely rehash an issue and evidence that was available to them in *Brown I*. This claim is also dismissed as *res judicata*. *Wilkin v. Sunbeam Corp.*, supra; *Brown v. McCormick*, supra; and *Bulloch v. United States*, supra.

V. CONCLUSION

IT IS HEREBY ORDERED that the Court grants the

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[9]Plaintiffs may request reconsideration of the issues decided against them herein within that same twenty day period only in the unlikely event that the disclosed documents unexpectedly contain information having a bearing on those issues that merits a reconsideration.

motion of the defendants Uniroyal Goodrich Canada, Inc., and Uniroyal Chemical, Ltd./Uniroyal Ltee. for summary judgment as to all claims of the plaintiffs.

IT IS FURTHER ORDERED that the Court grants the motion of the defendants Uniroyal, Inc. and Uniroyal Goodrich Tire Co. for summary judgment, in part, as to all claims except any claims to reopen the case assigned Docket Number 88-020-C in this court on account of the allegedly false statements made by defendants regarding notice to Uniroyal, Inc., and whether Uniroyal, Inc. had an adequate opportunity to participate in discovery that were made in papers filed in opposition to the plaintiffs' motion to amend their complaint to add Uniroyal, Inc. as a party in Docket No. 88-020-C.

IT IS FURTHER ORDERED that this decision of the court is without prejudice to the right of the defendants to renew their motion for summary judgment, together with such papers as they deem appropriate, as to any unresolved claims within twenty days of the date on which plaintiffs are provided with their requested documents (or so many of those requested

documents as this court determines plaintiffs are entitled to). Plaintiffs may request reconsideration of the issues decided against them herein within that same twenty day period only in the unlikely event that the disclosed documents unexpectedly contain information having a bearing on those issues that merits a reconsideration.

H. DALE COOK
United State District Judge

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BETTY BROWN; ROGER BROWN,

Plaintiffs-Appellants,

v.

No. 96-7007

UNIROYAL, INC.; UNIROYAL GOODRICH TIRE CO.,

Defendants-Appellees.

ORDER

Filed May 1, 1997

Before **TACHA, McWILLIAMS, BALDOCK,** Circuit Judges.

Appellant's petition for rehearing is denied by the panel that rendered the decision.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. No member of the panel and no judge in regular active service on the court requested that the court be polled on rehearing en banc so the suggestion for rehearing is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by:_____
Deputy Clerk